Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

PEDRO SANCHEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the failure to apply the established Supreme Court standards regarding the production of *Jencks* material as set forth in *Campbell v. U.S.*, 373 U.S. 487 (1963), (in a case involving over 200 *Jencks* reports compiled over a several year period, recounting FBI debriefings of the sole witness against the defendant, at a trial which, due to government delay in indicting the defendant, took place three years after the events referred to in the *Jencks* material, resulting in memory lapses of the sole witness), undermine and compromise the fact-finding process of the criminal justice system and the fair and just administration of criminal justice.

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OPINION BELOW

The unpublished corrected opinion of the Eleventh Circuit Court of Appeals, entered on February 9, 1996, is reprinted in the Appendix at 1a - 10a. Only the first paragraph summarily affirming Petitioner's conviction and sentence, without opinion, pursuant to Eleventh Circuit Rule 36-1 is relevant to this Petition. The entire opinion, however, is included for completeness.

STATEMENT OF JURISDICTION

The opinion of the Eleventh Circuit, affirming a judgment of conviction and sentence of the United States District Court for the Southern District of Florida, was entered February 9, 1996. App. 1a. This petition for certiorari is filed within 90 days of the February 6, 1996 opinion. The jurisdiction of this

Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any

> criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Statutory Provision

Title 18 U.S.C. §§ 3500 (b) and (e)(1) provide:

* * *

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such

statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

* * *

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

* * *

STATEMENT OF THE CASE AND THE FACTS

Petitioner Pedro Sanchez was charged along with co-defendants with violations of Title 21 U.S.C. §§ 952(a) and 963 conspiracy to import cocaine and Title 21 U.S.C. §§ 841 (a) and 846 conspiracy to distribute cocaine.

At his 1993 trial in Miami, Florida, he was convicted of both counts by a jury.

The criminal prosecution was based on a government sting operation, utilizing a six-time convicted informer (R10-2-3,34), in financial straits (R12-102-3) who was paid approximately $154,000 for his services by the government (R10-60-91) and was eligible for an additional $250,0000 government reward (R6-4-5).

The only evidence against the Petitioner was the informer and the informer's interpretation of certain

limited recorded conversations between the informer and Petitioner. (See R11-143-48; R12-29-32,120-21). During the trial, Petitioner requested the production of hundreds (R9-123-25) of FBI-302 reports prepared during debriefing meetings between the experienced FBI case agent and the informer which were held 4-7 days a week from November of 1989 through 1992 (R12-86-89; R6-3). At a hearing, the informer testified that with regard to his meetings with the Petitioner, he either took notes, which he later destroyed (R11-153-57), or memorized what was said, later repeating it to the FBI agent, who wrote it down. He and the agent would then discuss what the agent wrote down, and corrections would be made "[U]ntil it finally got right...". (R12-86-88). The informer testified:

Q. ..., when you

told Agent Flynn what you had memorized, he wrote it down, didn't he?

A. Everything, yes.

Q. And you saw what he wrote down, correct?

A. Not really. I was just telling him and he was writing, he was writing down.

Q. Did he and you discuss it when he finished writing?

A. Yes.

Q. If he said something to you about what happened and it wasn't accurate you would correct him,

right?

A. Yes.

Q. And so by the time you and he finished talking, whatever he had written down was an accurate representation of what you told him, correct?

A. Yes. ...

Q. But he discussed it with you and any inaccuracies he corrected and you made those changes?

A. Yes.

Q. Until it finally got right, correct?

A. Yes.

(R12-87-88). The district court denied Petitioner's request for production, notwithstanding the informer's testimony, presumably concluding that the reports were not statements adopted or approved by the informer since the informer additionally testified (in response to the district court's inquiry) that after the foregoing process, the agent's notes were not provided to the informer for him to read. (R12-88-89).

On June 9, 1993, the Petitioner was convicted on both counts. In his new trial motion, the Petitioner reasserted his entitlement to the production of the statements, citing *Campbell v. U.S.*, 373 U.S. 487 (1963). (R3-65-1-4). This claim was again denied by the district court. (R3-202).

On August 27, 1993, judgment was entered against Petitioner and he was

sentenced to, *inter alia*, incarceration for a period of 292 months (R4-219) and a notice of appeal was timely filed. (R4-221). Petitioner is incarcerated at a federal institution on the sentence imposed by the district court.

On appeal to the Eleventh Circuit Court of Appeals, Petitioner again raised the *Jencks/Campbell* issue. (Petitioner's Initial Brief in the Eleventh Circuit at pages 25-35).

The Eleventh Circuit summarily affirmed the Petitioner's convictions and sentence, without opinion, in accordance with Eleventh Circuit Rule 36-1. (App. 1a).

REASONS FOR GRANTING THE WRIT

The decision below conflicts with *Campbell v. U.S.*, 373 U.S. 487 (1963), and as a result, the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court.

It is axiomatic that a defendant in a criminal case is entitled to meaningful confrontation. (Sixth Amendment). To that end, Congress enacted the *Jencks* Act (18 U.S.C. § 3500). This Court long ago decided *Campbell v. U.S., supra*. In *Campbell*, the question was whether an FBI interview report predicated upon an agent's notes taken during the interview of a key witness, was producible under the *Jencks* Act as a written statement adopted or approved by the witness. *Id.* at 491.

The agent had taken notes of pertinent information, although not a word-for-word transcription of what the witness had said. *Id.* at 489. The agent then recited back to the witness the substance of his account, referring to his notes, but had not read his notes to the witness, and the witness informed the agent that that which was repeated was, to the best of his knowledge, correct. *Id.* at 489-91. The witness never read or signed the agent's notes. *Id.* at 490. Thereafter, the agent rearranged his notes to coincide with the chronology of the witness' account and dictated an interview report, relying primarily upon his notes, but also upon his memory. *Ibid.* After the agent had verified the transcribed report against the notes, the notes were destroyed. *Ibid.*

In holding that the interview report

constituted a written statement adopted or approved by the witness under § 3500 (e)(1), the Supreme Court concluded that the agent's oral version of his notes, presented to the witness for verification, could fairly be deemed a reading back of the notes, so that the witness' later adoption of the oral presentation constituted the requisite adoption of a written statement. *Id.* at 492. Acknowledging that there might "well be small differences as among the notes, oral presentation, and Interview Report, " *id.* at 495, the Court nonetheless opined that the district court was entitled to rely upon the ability of an experienced FBI agent to record, with sufficient accuracy, the statement of a potential witness. *Ibid.* Reversal for a new trial was mandated since production of the agent's report not only "gives effect to the

command of the statute [which] is...designed to further the fair and just administration of criminal justice", *id.* at 495 (citation omitted), but also was imperative given the impeachment value of statements made contemporaneous to the significant events on trial:

> Every experienced trial judge and trial lawyer knows the value for impeachment purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the

contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Id. at 496 n. 12 (citation omitted).

So too, in the present case, the agent's oral recitation to the informer/witness of the interview report and subsequent corrections until they "finally got right" (R12-88), rendered the written statements "adopted or approved" within the meaning of the *Jencks* Act. The district court's denial of production, apparently due to the agent's failure to give "the paper to [the informer] after he finished" writing what the informer had said (R12-88), was legally erroneous under *Campbell*. As the Court explicated in *Jencks v. U.S.*, 353 U.S. 657, 668-69 (1957) (footnote omitted):

(1957) (footnote omitted):

> Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less.

In the present case, the informer/witness clearly approved and adopted the subject statements. The lower courts' ruling clearly curtailed, impinged and prevented Petitioner from obtaining his rights of meaningful confrontation and cross examination.

This is particularly critical in a case such as this, where the error in the

trial court cannot be deemed harmless for the following reasons. The impeachment of the informer/witness was the cornerstone of and Petitioner's entire defense at trial. (R11-151-52). The informer/witness had destroyed, prior to trial, the only other writings made contemporaneous to the alleged conspiratorial meetings. (R11-157). The tapes of isolated portions of conversations, as selected and corrected by the informer/witness (R12-115-117), were inculpatory as to Petitioner only when editorialized upon by the informer/witness. (See R11-143-48; R12-29-32, 120-21). Trial proceedings were conducted three years subsequent to the conspiracies alleged in the indictment (See R1-1; R9), and the informer/witness suffered from memory lapses at trial according to the government (Brief for the

United States in the Eleventh Circuit at page 50). The informer/witness had been convicted on six prior occasions (R10-2-3, 34), was paid approximately $154,000 by the government (R10-60,91), and was eligible for an additional $250,000 government reward (R6-4-5), thereby providing motivation for embellishment and fabrication.

District and circuit courts may not ignore Supreme Court mandates under any circumstances and must never ignore Supreme Court mandates under circumstances such as these. By doing so, the Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the lower court, so as to call for an exercise of this Court's power of supervision. Only this Court's granting the writ can now remedy the assault on, and destruction

of, the very fact-finding process in this and similar cases.

CONCLUSION

For the foregoing reasons certiorari should be granted and the case set for plenary review.

Respectfully submitted,

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May, 1996.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition was mailed this _____ day of May, 1996, to: The Solicitor General of the United States, Room 5614, Department of Justice, 10th Street & Constitution Ave., N.W., Washington, D.C. 20530; and Madeleine R. Shirley, Esq., Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132.

_____

WILLIAM AARON

APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
FEBRUARY 9, 1996
Corrected Copy
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-4981

D.C. Docket No. 93-0081-CR-DLG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

Jorge Brito,
Tomas Pulgaron,
PEDRO SANCHEZ
Roberto Carvajal,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(February 9, 1996)

Before KRAVITCH, ANDERSON and BARKETT, Circuit Judges.

KRAVITCH, Circuit Judge:

Appellants Jorge Brito, Tomas Pulgaron, Pedro Sanchez and Roberto Carvajal appeal their convictions and

sentences for conspiracy to import cocaine, in violation of 21 U.S.C. §§ 952 (a) and 963, and conspiracy to distribute cocaine, in violation of 21 U.S.C. §§ 841 (a) and 846. Carvajal also appeals his conviction and sentence for possession with intent to distribute cocaine in violation of 46 U.S.C. App. § 1903 (a) and 18 U.S.C. § 2. We summarily affirm the convictions of all appellants and the sentences of Appellants Pulgaron, Sanchez and Carvajal.[1] We vacate Brito's sentence and remand to the district judge for resentencing consistent with this opinion.

I.

We briefly recount only those facts relevant to Brito's sentence. The Federal Bureau of Investigation launched an undercover operation using a boat repair

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[1] See 11th Cir. R. 36-1.

business, known as "Manny's Marine," to investigate drug trade in South Florida and the Caribbean. The business was operated by Manuel Sanchez (Manny), a government informant. The undercover marina did not conduct legitimate business during the time of the operation and only people involved in drug trading were permitted to dock their boats at the marina. The FBI installed video cameras and tape recordings inside the marina offices.

Brito, a boat captain, owned a cabin cruiser which was maintained at Manny's Marine. On June 18, 1990, Brito filled out an application for employment at Manny's Marine, but he was never employed there. Manny testified that Brito completed the application so that he could claim to be an employee of the marina if he was stopped by the Coast Guard. On

August 25, 1990, Brito met with Manny and Nelson Valdivia, an unindicted co-conspirator, at Manny's Marina and the conversation was taped. During the meeting, Manny and Brito discussed an upcoming fishing expedition and Brito also made reference to retrieving something "from the top." At trial, Manny interpreted these remarks as signifying that they were getting ready to pick up "a load" that was to be airdropped into Bahamian waters.[2] On August 31, 1990, Brito's vessel left the marina. It later

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[2]Manny defined the term "load" in prior testimony discussing the reason that Pedro Sanchez, a co-conspirator, kept his boats at Manny's Marine:

Q: And what did you -- what was the purpose of having those boats there?
A: The main purpose?
Q: Yes, sir.
A: To go and pick up loads.
Q: When you say "to go and pick up loads" what does that mean?
A: Drugs, cocaine.
R.11 at 59

sank; the record does not indicate when or why it sank.

On November 17, 1990, Manny, Capel and Carvajal prepared a thirty-four foot lobster boat to travel to the Bahamas to pick up cocaine. Capel was to serve as captain and Carvajal as crew. The two set out on November 18. On November 27, a Coast Guard cutter approached the vessel and the crew questioned Capel and Carvajal. The Coast Guard took the vessel back to the station and searched the boat. The search revealed 294 kilograms of cocaine.

The day after the boat was seized, Manny held a strategy meeting at the marina in which Sanchez, Pulgaron and Carvajal participated. Brito was not present. They decided to send Manny to the Coast Guard to retrieve the boat, but Manny was unable to do so, and those

present at the meeting went into hiding. Later, appellants were arrested, tried and convicted. They were all sentenced based on the 294 kilograms of cocaine seized by the Coast Guard.

III.

Brito argues that the district court erred in sentencing him based on the entire amount of the cocaine found by the Coast Guard when none of the testimony or evidence concerning this shipment implicated him. Brito acknowledges that evidence did exist which linked him to the earlier plan to bring in a "load" using his boat. He contends that the district court should only have sentenced him based on his involvement with that part of the conspiracy. We agree based on this court's recent decision in United States v. Reese, 67 F.3d 902 (11th Cir. 1995).

In Reese, this court interpreted an

amendment to section 1B1.3 of the Sentencing Guidelines and accompanying commentary which changed the scope of a defendant's responsibility with respect to jointly undertaken criminal activity. Prior to this amendment, section 1B1.3 and its commentary suggested that a defendant could be held liable for all conduct of the co-conspirators that was reasonably foreseeable by the defendant. The amended commentary now clarifies that the defendant is held accountable only for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. § 1B1.3 comment. (n.2) (emphasis added).

As this court stated, "[u]nder this commentary, reasonable foreseeability alone is no longer sufficient to establish accountability. Instead, defendants are

only accountable for other conduct that was reasonably foreseeable and within the scope of the criminal activity that the defendant agreed to undertake." Reese, 67 F.3d at 907.

To illustrate the change, this court quoted an example in the commentary notes which is analogous to the facts in the instant case. The example reads:

> (3) Defendant H and I engaged in an ongoing marihuana conspiracy in which Defendant J was hired only to help off-load a single shipment. Defendants H, I, and J are included in a single count charging conspiracy to import marijuana. Defendant J is accountable for the entire single shipment of marijuana he helped import...and any acts and omissions in furtherance of the importation of that shipment that were reasonably foreseeable....He is not accountable for prior or subsequent shipments of marihuana imported by Defendants H or I because those acts were not in furtherance of his jointly undertaken criminal activity (the importation of the single shipment of marihuana).

Id. (quoting U.S.S.G. § 1B1.3 comment. (n. 2). Applying this reasoning to Brito, he

should be held responsible only for his own attempt to import drugs and his acts in furtherance of that scheme, but not for the subsequent shipment planned by his co-conspirators and Manny.[3] Because the record reveals no evidence that Brito participated in the subsequent scheme, it was not within the scope of the activity that he jointly undertook. Accordingly, we hold that the district court erred in attributing the amount of cocaine from the

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[3]See also U.S.S.G. § 1B1.3 comment (n. 2):

> (5) Defendant O knows about her boyfriend's ongoing drug-trafficking activity, but agrees to participate on only one occasion by making a delivery for him.... Defendant O is accountable...for the drug quantity involved on that one occasion. Defendant O is not accountable for other drug sales made by her boyfriend because those sales were not in furtherance of her jointly undertaken criminal activity (i.e. the one delivery)."

November 18 voyage to Brito.

We VACATE Brito's sentence and REMAND for resentencing.